UNITED NATIONS

E

Economic and Social Council

Distr.
GENERAL

E/CN.4/1995/31/Add.4
21 December 1994

ENGLISH
Original: ENGLISH/FRENCH

COMMISSION ON HUMAN RIGHTS
Fifty-first session
Item 10 of the provisional agenda

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Working Group on Arbitrary Detention

Visit to Viet Nam

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GE.94-75147 (E)

Introduction

1. The Working Group on Arbitrary Detention was invited to visit Viet Nam in a letter dated 8 April 1993 addressed by the Vietnamese Deputy Minister for Foreign Affairs, Mr. Le Mai, to the Chairman/Rapporteur of the Working Group. The visit was to take place in April 1994, but it had to be postponed as a result of some points of disagreement about the arrangements for the visit. After a solution was found in the negotiations held by the Vietnamese authorities and the Working Group, the visit finally took place from 24 to 31 October 1994.

2. The Working Group, represented by its Chairman/Rapporteur, Mr. L. Joinet, and two of its members, Mr. L. Kama and Mr. K. Sibal, stayed in the capital, Hanoi, and its region from 24 to 26 October, in Da Nang on 27 October and in Ho Chi Minh City from 29 to 31 October. In Hanoi, the delegation was received by the Minister of Justice, Mr. Nguyen Dinh Loc, the Deputy Minister of the Interior, Mr. Le Minh Huong, the Deputy Minister for Foreign Affairs, Mr. Le Mai, the President of the Supreme Court, Mr. Pham Hang, and the Vice-President of the People's Supreme Prosecution Department. In Da Nang and Ho Chi Minh City, the Working Group held a joint meeting with representatives of the District Prosecutor's Office and the district police, as well as with judges of the district court.

3. The Working Group also visited three detention centres, described as re-education and rehabilitation labour camps, namely, camp A.5 in Thanh Hoa province; camp A.20 in Xuan Phuoc, in Phu Yen province; and camp Z.30 in Ham Tan, Binh Thuan province. The members of the Working Group were received by the directors of these three camps and were able to talk with prisoners, either privately (in some cases) or in the presence of one or more representatives of the authorities.

4. In their official talks in Hanoi and Ho Chi Minh City, as well as during the visit to camp A.5 in Thanh Hoa, the members of the Working Group were accompanied by the Director of the Department of International Organizations in the Ministry of Foreign Affairs. The members of the Working Group wish to thank him, the representatives of the Ministry of the Interior and the Ministry of Foreign Affairs who accompanied them during the visits to Da Nang, Ho Chi Minh City and the detention camps and the representatives of the provincial police forces concerned, who facilitated their travel.

I. CONTEXT OF THE VISIT

5. From the point of view of the Vietnamese authorities and that of the Working Group itself, the visit took place in a context which must be viewed in the light of the comments made in the following paragraphs.

6. The Commission on Human Rights will have noted that this was a "first", both for the Working Group, which had not yet made an on-site visit, and for the Vietnamese authorities, which were, in an unprecedented move, extending an invitation to a United Nations body with a human rights mandate.

7. This is the context in which the Working Group was called upon not only to carry out its mandate by inquiring into the legal situation of persons deprived of liberty, but also to draw conclusions from this initial experience in order to add to its methods of work, which have so far been defined only for the handling of communications giving rise to decisions or discussions.

8. In taking the initiative of extending this invitation, the Vietnamese authorities informed the Working Group in advance of certain constraints relating, for example, to the choice of interpreters or the national regulations applicable to visits with prisoners, which restrict or rule out the possibility of speaking with prisoners unless a representative of the administration is present.

9. The Working Group, which was aware that many of these procedural problems were the result only of the lack of precedents, finally agreed to the general framework of the invitation by the Vietnamese Government. It was agreed that the Working Group would not make the waiver of certain constraints a prerequisite if they were given on-site consideration by both sides with a view to finding solutions on a case-by-case basis taking account of the general framework both of the Working Group's mandate and of the Vietnamese context of the invitation.

10. Some of these constraints were in fact waived at the beginning of the mission, for example, those relating to the choice of interpreters, or reduced as the visit went on, for example, the conditions in which the mission was to talk with prisoners in the re-education and rehabilitation labour camps. Although the mission regretted and continues to regret that this was not always the case, several prisoners freely chosen by the Group in situ were heard in full confidentiality and, in particular, without witnesses.

11. Other constraints could not be waived. For example, the Working Group did not have an opportunity to visit pre-trial detention centres. It was also not able to obtain statistical data on prisoners. This is all the more regrettable in that a positive response probably would have led it to reach a conclusion that was favourable to the Government. The Working Group had the feeling, but was unable to verify it, that the number of political prisoners in Viet Nam was probably lower than that reported by certain sources or, in any event, considerably less high than that put forward only a few years ago. In this connection, the Working Group pointed out that, since its establishment, it had, of course, dealt with cases of individual arrests or arrests of groups of persons, but not with cases which were the result of waves of massive arrests comparable to those which had taken place in the past. The Working Group nevertheless wishes to stress that, apart from the reception it was given, its travel arrangements were made in a spirit of efficient cooperation, particularly on the part of the police services, which, from the beginning of a difficult itinerary until the end, paved the way for the Working Group diligently and courteously, both day and night, without ever interfering with the mission.

II. LEGAL STATUS OF PERSONS DEPRIVED OF LIBERTY

A. Applicable rules of law

1. Procedural rules

(a) Arrest and pre-trial detention

12. An arrest may be made in two types of situations. The first is that which is provided for in article 63 of the Code of Criminal Procedure and which deals with the arrest of persons as a matter of urgency, i.e. in accordance with this article:

(a) When there are reasons to believe that a person is preparing to commit a serious violation of criminal law;

(b) Where the victim or any other person present at the scene of the crime has been an eyewitness to the crime and has recognized the person who committed it and where the arrest is necessary to prevent that person from getting away;

(c) Where evidence of a crime has been discovered on the person or at the home of the suspect and where the arrest is necessary to prevent him from getting away or the evidence from being destroyed.

The second situation relates to flagrante delicto and persons wanted for the commission of a crime. It is covered by article 64 of the Code of Criminal Procedure, which, in such cases, entitles any person to arrest the persons concerned and to take them to the nearest police station, to the prosecutor or to the people's committee.

13. Where persons are arrested as a matter of urgency or in flagrante delicto, the investigation services must take their statements as soon as they have been brought in and, within 24 hours, either issue an arrest warrant or release them (art. 65, para. 1). In the case of persons who are wanted, the investigation services must, after having taken their statements, immediately inform the authority who issued the wanted notice and take the persons to the nearest detention centre (art. 65, para. 2). A guarantee for persons in respect of whom an arrest warrant is issued is provided for in article 67, which makes it an obligation for the official who issued the warrant to inform the family of the arrested person without delay, as well as the committee of the village where the person lives or works.

(i) Police custody

14. Article 68 provides for the possibility of placing in police custody a person arrested as a matter of urgency or in flagrante delicto, as referred to in articles 63 and 64. Within 24 hours, the order for police custody must be submitted for the opinion of the prosecutor at the corresponding level. If he considers that the order is not necessary, he must cancel it and order the

release of the person concerned without delay. It should be made clear that, under article 68, paragraph 2, the order for police custody must clearly indicate the reasons why this measure must be taken and the date thereof. A copy of the order must be given to the person concerned.

15. According to article 69, paragraph 1, the period of police custody cannot exceed three days, renewable once if the investigation so requires. In exceptional cases, this maximum period of time, totalling six days, may be extended once again, but not for more than three days. In any event, no extension can take place without the approval of the prosecutor at the corresponding level. Upon expiry of the period of police custody and if the investigation has not revealed sufficient reasons for the institution of proceedings against the person concerned, he must be immediately released. The period of police custody is included in the prison term.

(ii) Pre-trial detention

16. Under article 70 of the Code of Criminal Procedure, pre-trial detention may be imposed on a person who has committed a serious crime or offence punishable by a penalty of one year or more under the Penal Code and when there are serious risks that he may get away, obstruct the investigation or commit another crime. Pre-trial detention takes place only in centres intended for this purpose. Each province has at least one centre.

17. Except in special circumstances, pre-trial detention cannot be imposed on weak elderly persons, seriously ill persons or women who are pregnant or breast feeding an infant aged under one year. Instead, such persons may be subjected to other corrective measures such as house arrest or bail (art. 76). Persons who, under article 62 of the Code of Criminal Procedure, are entitled to issue an arrest warrant (people's prosecutor and his deputy, military prosecutors at all levels, the president and vice-president of people's courts at all levels, the district police commissioner and his deputy, etc.) are the only ones authorized to issue a warrant of detention. However, this warrant must be approved by the prosecutor's office at the corresponding level before it is served if it is issued by a police commissioner or his deputy or by the head or deputy head of investigation services at all levels in the armed forces of the people. Like an arrest warrant, a detention warrant must be notified to the detainee's family. However, the family of an untried prisoner does not have visiting rights, since that might obstruct the investigation.

(b) Investigation stage

18. In accordance with article 92 of the Code of Criminal Procedure, investigations are conducted by:

(i) The investigation services in the security police forces;

(ii) Such services in the armed forces in the case of offences within the jurisdiction of the military courts; and

(iii) The people's prosecutor's offices.

In some circumstances, the Prosecutor of the People's Supreme Prosecution Department may assign an investigation to the prosecutor's offices. During the investigation, the competent services may collect material evidence, examine witnesses or the victim and question the untried prisoner or accused person. They may also conduct searches, with an obligation (art. 117), at the start of the operation, to read out the content of the search warrant to the person concerned, who must also be informed of his rights and obligations. During such searches, the investigators are authorized to seize items which may have been used to commit, or are the proceeds of, the offence. In connection with the seizure of correspondence, telegrams, etc., article 119 requires not only that the investigators establish a mandate for the purpose, but also that the mandate should be approved by the corresponding prosecutor's office. In the event of emergency, however, these documents may be seized even if these requirements are not met, but the reasons for the emergency must, in such a case, be clearly indicated in the seizure report and the prosecutor's office must be informed of the seizure as soon as the operations have ended. All the items seized must be kept intact and their destruction or misuse is punishable by the penalties provided for in article 244 of the Penal Code. Searches and seizures must be the subject of a report that clearly indicates the place, date, time and end of the operation, the officials who carried it out, the persons present, etc. The report must be signed by all the persons concerned, who may make amendments to it. The investigators may also use the services of one or more experts when technical problems beyond their competence arise.

19. Article 141 of the Code of Criminal Procedure gives the prosecutor's office power to monitor the investigation, as well as decision-making power in connection with the post-investigation proceedings. In the exercise of its monitoring power, it ensures that investigations are conducted in accordance with the law, uncovers any illegal practices and takes the necessary corrective action. It also guarantees that no innocent person is prosecuted and that no person is unlawfully arrested, held in police custody, detained, deprived of his rights or attacked in his dignity and honour. It may replace an investigator with whom it is not satisfied and entrust the investigation to another or conduct it itself. It may also order a further investigation. In accordance with its decision-making power in connection with the follow-up to the investigation, it may, within 30 days of receiving the file, bring the untried prisoner or accused person before the trial court, order a further investigation or dismiss the case definitively or temporarily. If it wants to bring the untried prisoner or accused person before the trial court, it has to prepare an indictment clearly indicating the date, time and place of the offence, the means used to commit it, the motive for and consequences of the offence, the evidence against the person who committed it, the personality of that person and the aggravating or extenuating circumstances. The indictment must also state the name of the person who issued it, the date of issue and the articles of the Penal Code providing for and punishing the offence.

(c) Trial and remedies

20. Under article 145 of the Code of Criminal Procedure, district courts in Viet Nam have jurisdiction in first instance for any offences punishable by a term of up to seven years' imprisonment, with the exception of certain offences, especially particularly dangerous breaches of national security.

The provincial courts have jurisdiction for any offences which are not within the jurisdiction of the district courts. If they wish, they may even hear cases within the jurisdiction of those courts. In criminal matters, the Supreme Court has jurisdiction in the first and last resort for particularly serious and complicated cases.

21. Starting from the day when it receives the file of the proceedings transmitted by the prosecutor's office together with the indictment, the judge has a period of 45 days for the least serious offences and a period of 3 months for more serious offences in which to study the case and decide to try it, to order a further investigation or to dismiss the case temporarily or definitively. When the case is complicated, the president of the court may increase the period of 45 days by a further period not to exceed 30 days. Where it is decided that the case should be tried, the court must do so within 15 days. This decision must be notified to the untried prisoner or accused person, his counsel and that of the defence within 10 days before the start of the trial. The notification must state the name, date and place of birth, occupation and address of the accused person, the offence with which he is charged and the articles of the Penal Code which provide for and punish it, the date, time and place of the trial, the names of the judge, the people's co-magistrates and the clerk of the court, the name of the representative of the Department of Public Prosecutions at the trial, the names of the lawyer and the interpreter, if any, the names of any persons summoned to be heard by the court and the material evidence submitted for assessment by the court.

(i) Composition of the trial court

22. The trial court is composed of a panel of judges. It usually sits with one judge and two people's co-magistrates. In serious and complicated cases, however, there can be two or three judges and co-magistrates. Where the accused is liable to the death penalty, there will be three judges, assisted by three co-magistrates (art. 160).

(ii) Proceedings

23. The proceedings before the court are public, except for those held in camera on substantiated grounds, and are oral. They are conducted by the presiding judge, who is in charge of court policing. During these proceedings, the court asks questions and hears the statements on the facts by the accused, the claimant for criminal indemnification, his counsel, witnesses, experts, etc. It examines the material evidence brought against the accused. A judgement can, moreover, be handed down only on the basis of material evidence examined during the trial (art. 159, para. 1). The trial must take place in the presence of the accused and possibly of his counsel, except where he is on the run or outside the national territory and it is not possible to lay hands on him or where his absence is not likely to obstruct the proceedings.

(iii) Pronouncement of sentence

24. The right to rule in the case belongs exclusively to the judges and the co-magistrates, who must take a decision on each question separately by majority vote. A member in the minority is entitled to request that his dissenting opinion should be included in the file. The Working Group is,

however, not in a position to determine whether this right is frequently exercised. The court may pronounce sentence, but it may also decide to acquit and discharge the accused. It must order his immediate release, provided that he is not being detained for another reason, when he is not guilty, when he has been sentenced to a penalty other than imprisonment, when his penalty is covered by pre-trial detention or when a penalty is not applicable to him or he benefits from grounds for exemption from criminal liability. The president reads out the ruling. He then gives explanations on the enforcement of the sentence and notifies the accused and the other parties concerned of their right of appeal.

(iv) Remedies

(a) Appeal

25. Within 15 days of the pronouncement of sentence, the court must issue a copy of the judgement to the accused, to the prosecutor's office and to the defence counsel. When the accused has been tried in absentia, a copy of the judgement must be notified within the same period. The victim, the claimant for criminal indemnification and his counsel are entitled to request excerpts or a copy of the judgement from the court. Under article 204 of the Code of Criminal Procedure, an appeal is defined as the procedure by which a higher court may re-examine a decision taken in first instance which has not yet become res judicata and which has been appealed. The appellant must file an application for this purpose with the court which ruled in first instance or with the Appeal Court. The appeal may also be made by oral statement to the court which heard the case in first instance. In this case, it must be recorded in a report. The time-limit for an appeal is 15 days from the pronouncement of sentence. In the event of trial in absentia, the time-limit for the accused starts when he is notified of the sentence or it is posted outside his home, his place of work or his neighbourhood, village or town committee. The appeal has a suspensive effect.

26. With regard to the prosecutor's office, the Vietnamese Code of Criminal Procedure refers not to "appeal", but to "protest". This is the procedure by which the Department of Public Prosecutions may challenge a ruling handed down in first instance. According to article 207, paragraph 2, the prosecutor's office must do so in writing, clearly indicating why it does not agree with the ruling handed down. This "protest" may be made by the prosecutor's office at the level corresponding to that of the court which handed down the ruling or by the prosecutor's office at a higher level. In the former case, the time-limit is 15 days from the pronouncement of sentence and, in the latter, 30 days.

27. As far as "appeal" is concerned, it should be made clear that article 215 gives the provincial courts and the Appeal Court of the Supreme Court appellate jurisdiction. The Code does not provide for the equivalent of an application for judicial review. This explains why, as the President of the Supreme Court indicated, the Supreme Court, which is exclusively an appellate court (against decisions of provincial courts), may review the facts of the case, the characterization of the offence and the guilt of the accused. The time-limit for the appellate court to rule on the appeal is 60 days for provincial courts and 90 days for the Supreme Court ruling on appeal.

Proceedings before the Appeal Court are conducted according to the same procedure as in first instance, with the prosecutor's office and the parties concerned assisted by their counsel, as appropriate. Proprio motu or at the request of the Appeal Court, the prosecutor's office may produce new evidence which must be examined and compared with the old evidence. The Appeal Court may either reject the appeal or "protest" and uphold the decision appealed, change it or even reject it by ordering that the case should be further investigated, tried again in first instance or referred back to the court handling it earlier, specifying that the court's composition must be different.

(b) Review

28. There is a review procedure for judgements and decisions having force of res judicata, but handed down in violation of the law. This is the case when the examination of the facts and the interrogation were conducted in a biased or inadequate manner, when there is a contradiction between the operative part of the decision and the facts as they result objectively from the proceedings, when serious violations of criminal procedure came to light during the investigation or the proceedings or when serious errors were committed in the enforcement of the Penal Code. Power to request a review of decisions handed down by courts at any level is vested in the President of the Supreme Court and the Public Prosecutor in that Court. It is also vested in the Vice-President of the Supreme Court and the Deputy Public Prosecutor in respect of decisions handed down by lower courts. The president of a provincial court and the public prosecutor of that court have the same powers in respect of decisions handed down by district courts. At the provincial court level, a judicial committee considers the application for review, while, at the Supreme Court level, the Criminal Chamber does so. The exercise of its review power enables the court concerned to dismiss the application for review and thus uphold the decision having force of res judicata; to overturn the decision and close the case; to overturn the decision and order a new investigation or a new trial; or to amend the decision.

(c) Courts of special jurisdiction

29. Military courts are the only courts of special jurisdiction in Viet Nam, if they may be regarded as such. At the district level, they are regional military courts. At the provincial level, they are sectoral courts and, at the top, there is the High Military Court. These courts have jurisdiction for any offences assigned to them by law and, basically, the Code does not seem to make any distinction between offences committed by the military in the exercise of its functions and those not committed in the exercise of those functions.

30. Persons prosecuted for breaches of State security are tried by the same courts as ordinary offenders, except that the provincial courts have jurisdiction in first instance.

(d) Enforcement of penalties

31. In the case of the death penalty, article 228 of the Code of Criminal Procedure provides that, as soon as the decision carrying this penalty becomes res judicata, the file of the proceedings must automatically be submitted to the President of the Supreme Court and a copy of the decision must be submitted to the Public Prosecutor of the Prosecution Department of the Supreme Court. Within two months of receiving the file, the President of the Supreme Court and the Public Prosecutor must decide whether a "protest" should be filed against this decision in accordance with the review procedure. The convicted person, for his part, has a period of seven days as from the time when the decision has become res judicata in order to apply to the Council of State for an amnesty. The Court may also hand down penalties of life or long-term imprisonment to be served in re-education labour camps. However, it may also decide that the prison term is to be served outside prison, according to the conditions it defines, or that rehabilitation through labour is to take place without detention.

32. In such cases, the convicted person will be handed over to Government agencies in the village or town where he lives or works, which will assume responsibility for his education. The court may also adopt an order prohibiting him from having access to certain places in the country. There is also the possibility that he may be given a reduction or full or partial remission of the penalty.

33. It should be pointed out that chapter XXII of the Code of Criminal Procedure (arts. 271 to 280) relates to juvenile delinquency. In the case of an offence committed by a minor, all persons involved in the investigation, proceedings and trial must have some knowledge of psychology, educational sciences and the prevention of juvenile delinquency, since it is important for them to have an idea of the personality and the family, social and academic situation of the delinquent child or adolescent. The legislator has given the above-mentioned persons the possibility of entrusting a minor to his parents with an obligation for them to supervise their child, his personality and his education. They must undertake to represent him whenever he is summoned by the police or by the courts for the purposes of the investigation. It is also compulsory for minors to be accompanied by a lawyer. The Bar may be requested to appoint a lawyer if the minor or his family cannot afford one. A minor's legal representatives may assist him during the investigation stage and in proceedings in the trial court. The same right is granted to representatives of his school, the Ho Chi Minh Youth Union and other social welfare organizations in the place where he lives or works. Pre-trial detention should be the exception for delinquent minors. It may be ordered in some cases because a minor has committed a serious crime or because the aim is to prevent him from running away. In this case, as in the case where he has been convicted, he must be detained separately from adults. The age of criminal responsibility in Viet Nam is 18 years.

(e) Substantive rules (legality of offences and penalties)

34. The original feature of the Code of Criminal Procedure is that it starts with a chapter containing a whole set of basic principles. This chapter, in which there are 26 articles, proclaims the equality of citizens before the

law, the right of all citizens to security of person, to the protection of their life, health, property, honour and dignity and to the presumption of innocence, the rights of the defence and the obligation for investigation services, courts and prosecutors' offices to guarantee the defence of indicted and accused persons, the impartiality which must be displayed by all persons conducting or taking part in criminal proceedings, the independence of judges and co-magistrates who are answerable only to the law and the public nature of court proceedings.

35. Article 2 of the Penal Code provides that only persons who have committed an offence or a crime defined by a criminal law are subject to criminal prosecution. Like all the penal codes in the world, the Penal Code sets out the different crimes and offences and the penalties by which they are punishable. It refers, for example, to violations of privacy and physical integrity, economic offences, etc. However, it must be noted that the Penal Code attaches great importance to offences against the State and its organization and security, as well as against public order and socialist property. These offences are dealt with in chapter I of the Code, entitled "National Security" (arts. 72 to 100). For example, article 72 refers to high treason and article 73 deals with "activities designed to overthrow the power of the people". This article has often been criticized because it does not make a distinction, from the viewpoint of modus operandi, between persons who use violence to achieve their objectives and those who are involved only in political activities which are primarily peaceful and which are, in the final analysis, an expression of freedom of opinion, expression, association and assembly. From the point of view of penalties, article 73 does distinguish between principals and accessories, who are liable to 30 years' imprisonment, life imprisonment or the death penalty, and accomplices, who are liable to 30 years' or life imprisonment.

36. Another provision about which there may be some question is that, in many of these cases of offences against national security, reference is made to a kind of undefined aggravating circumstance, which applies where the offence was committed in "particularly serious circumstances", without any further details. Conversely, the penalty may be reduced if the offence was committed in "less serious circumstances", also without any further explanation. The fact is, however, that the lack of definition of these aggravating or extenuating circumstances may result in arbitrariness.

37. The interrogation of a woman prisoner at Ham Tam camp may have suggested that imprisonment for debt exists in Viet Nam. This prisoner told the mission that she was serving a 16-year prison term for having borrowed a large amount of money from a State bank that she could not pay back, but, on checking, it was found that this type of imprisonment is not provided for in the Penal Code. An offence has been committed in such a case only when the money has been obtained from the State through the use of fraud or when the borrower has not used the money in accordance with the loan contract.

B. Enforcement of the applicable rules

38. Here, it will be a question of determining whether the formal provisions described above concerning the legal status of persons deprived of their liberty are actually implemented.

39. With regard to police custody in matters of urgency or flagrante delicto and the need to forward the case file to the prosecutor's office for confirmation of the arrest warrant, it became clear from talks with the authorities that, while the 24-hour deadline could be observed in a town like Ho-Chi-Minh City, it was seldom possible in the provinces, because of transport problems. Moreover, with regard to the right to a defence, and the authorities' obligation to appoint defence counsel for accused persons liable to the most severe penalties, detainees informed the experts that not only were they not informed of this right after being arrested or placed in detention, but that in some cases no counsel had been appointed, despite the fact that they were liable for the death penalty. With regard to pre-trial detention, no significant violations were reported regarding the time-limit of two or four months, depending on the seriousness of the offence. The only problem, as stated above, is the prohibition of family visits during this period. No such prohibition is provided for in the Code of Criminal Procedure. The position of the authorities is that the 1992 ordinance on prison regulations precludes any possibility of visits by relatives. However, as soon as the reason for prohibiting such visits, namely to prevent any interference with the investigation, no longer obtains, it should be possible to authorize them. In this connection, the President of the Supreme Court announced the intention of the Vietnamese authorities to amend the law. In the meantime, according to the Public Prosecutor for Ho-Chi-Minh City, steps had been taken by some prosecutors to permit such visits, particularly in flagrante delicto cases.

III. FUTURE OF THE STATUS OF DETENTION

A. Improvements as presented by the Government

40. According to the Government, decades of savage warfare and reconstruction difficulties have made it impossible to bring domestic legislation into line with the provisions of the International Covenant on Civil and Political Rights in the period immediately following its ratification.

41. Many improvements are provided for in the liberalization process initiated by the new Constitution of 15 April 1992, which specifically provides for certain fundamental democratic rights in the political, economic, cultural and social spheres (art. 50), including the right of free enterprise (art. 57), the right to freedom of movement and of establishment anywhere in Viet Nam, to leave or return to the country (art. 68), the freedoms of speech, of the press, of information, of assembly, of association and of peaceful demonstration (art. 69) and of religion (art. 70).

42. The Government has also taken the following initiatives:

Making the People's Prosecutor accountable to the National Assembly in 1960, rather than to the Executive, a reform which is embodied in the 1992 Constitution;

The progress made in criminal law - although some shortcomings still exist - including the introduction of penalties for crimes against peace and mankind, and for war crimes and the recruitment of mercenaries;

Elimination of the practice of administrative detention;

The 1992 Amnesty for officers of the former regime;

The ratification of the following international human rights instruments:

(i) The International Covenant on Economic, Social and Cultural Rights (date of accession: 24 September 1992);

(ii) The International Covenant on Civil and Political Rights (date of accession: 24 September 1992);

(iii) The International Convention on the Elimination of All Forms of Racial Discrimination (date of accession: 9 June 1992);

(iv) The Convention on the Elimination of All Forms of Discrimination against Women (date of signature: 29 July 1980; date of ratification: 17 February 1992);

(v) Convention on the Prevention and Punishment of the Crime of Genocide (date of accession: 9 June 1991);

(vi) International Convention on the Suppression and Punishment of the Crime of Apartheid (date of accession: 9 June 1991);

(vii) Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (date of accession: 6 May 1983);

(viii) Convention on the Rights of the Child (date of signature: 26 January 1990; date of ratification: 1 March 1990);

Recognition of the precedence of treaties over domestic law.

B. Improvements to be made

1. Status of prison establishments

(a) Status of re-education and rehabilitation labour camps

43. Because of the inherent restrictions and prohibitions, insufficient transparency is a characteristic of these camps. For example, it is difficult, if not impossible, to obtain the following basic information:

General list of camps, prisons and temporary detention centres;

General statistics on detainees;

Number of prisoners in each establishment visited;

Presence or otherwise of persons sentenced for offences against national security and, where applicable, their number.

Furthermore, the Working Group was not authorized to consult the committal records on the grounds of "defence confidentiality", although it finally proposed consulting the records simply to determine the number of prisoners present, without noting the names. In one of the camps visited (A-20), the Working Group had the impression, for example, that there might be some disparity between the number of prisoners who could be accommodated and the estimate of the actual number of inmates. However, it was not possible to enter the detention premises (which are collective and do not contain cells) when the prisoners were present, because persons who were not members of the prison staff were not permitted access to them. Consequently, the Working Group was unable to ascertain whether any transfers had taken place.

44. This lack of transparency is doubly detrimental. Firstly, it can lead to errors in that the only way of proceeding is by extrapolation, deduction and cross-checks (see, in annex 1, the list - necessarily approximate - of the various places of detention drawn up by the Working Group on the basis of data provided by the Centre for Human Rights). Secondly, it can lead to the impression that the authorities concerned have something to hide.

45. The Vietnamese authorities having acquiesced to the visit of the Working Group, the Group hoped that the spirit of cooperation with which the Government had welcomed it would have percolated down to the lower echelons of the prison bureaucracy who were ultimately responsible for the detailed management of the visits. The Working Group believes that the difficulties encountered by it, as the visit progressed, were not the result of a deliberate posture on the part of the authorities but could be attributed to both lack of experience and the absence of effective communication between bureaucratic levels. Whereas in camp A-5 access to the prisoners was relatively easy, the Group encountered some difficulties in camps A-20 and Z-30. Hesitation on the part of the local authorities to admit the presence at Camp A-5 of prisoners convicted for having committed offences against the State was unnecessary on account of the inevitable discovery of their existence at the time of conducting interviews. The authorities admitted to their existence in the Group's subsequent visits to camp A-20 and camp Z-30. The Group noted that the prison authorities unnecessarily withheld information on the number of persons serving sentences in the prisons and the categories to which they belonged, since such details would have enabled the Group better to appreciate and understand the prevalent situation. The long distances required to be covered by road, together with the wariness with which prison officials approached a "first visit", added to the difficulties. The authorities were not even willing to inform the Group of the number of prisoners by referring to their own registers and were both cautious and circumspect about allowing the Group to have free access to the prisoners after they returned from the fields in the evening. The necessary atmosphere of transparency essential to make such visits entirely satisfactory was lacking. Yet the Group was able, despite obvious handicaps, to interview prisoners of its choice, in many instances without the presence of a government representative. The Group noted that at camp Z-30, the last visited, the authorities highlighted the positive aspects of prison life.

46. The reality described above does not take away from the historic significance of the visit, the importance of which lies in the willingness of the Vietnamese people to look at themselves through the eyes of others. This

is apart from the wealth of information gathered and the exchange of ideas, which facilitated each side understanding the other's position. Interviews with prisoners, the heart of the visit, were candid and marked by non-interference.

47. In camp Z-30, the only place where the selection of detainees to be interviewed could be made was at the entrance to the detention area, with one member of the Group being stationed near the door of the "political" building when the prisoners returned at the end of the day. It should be noted that, in camp A-5, the Working Group encountered none of these difficulties; prisoners were chosen by the Working Group at random to preclude any possibility of preselection; also, because of the time of day, the interviews were held outside the detention buildings, in the fields where the prisoners were working.

48. Otherwise, no obstacles were encountered. The Working Group visited the detention buildings during the day (when the prisoners were at work) and the premises used for general services (kitchens, maintenance, infirmary), and was able to speak with the prisoners and patients there. In all the camps, the solitary confinement cells were shown without hesitation. They seemed little used (in camp A-5, only for prisoners starting brawls, according to the administration; the Group noted the presence of shackles in these cells), or not used at all (in camp Z-30, the padlocks were rusted and the doors were opened only with difficulty). When asked about the infrequent use of isolation cells, camp authorities said that discipline was maintained essentially by withdrawing certain privileges, such as visits and mail, or by granting privileges, or even by public self-criticism, and by increasing the frequency or length of the visits on the basis of the degree of re-education as determined by the authorities. According to the authorities in one of the camps visited, this assessment is based on the following criteria:

Good conduct;

Agreement to receive instruction in civics. According to some prisoners questioned, this term really means lessons on the Communist Party and its ideals;

Absence of escape attempts;

Reporting to the authorities breaches of the regulations committed by other prisoners, such as planned escapes or riots.

(b) Status of pre-trial detention centres

49. Each province has at least one centre exclusively for pre-trial detention. Whereas re-education and rehabilitation labour camps intended solely for serving sentences come under the Ministry of the Interior, pre-trial detention centres are run by the provincial authorities. Detainees are placed under the supervision of the public prosecutor, who is empowered to make inspections. If the prosecutor finds that an individual has been placed in detention without legal grounds, he must order his immediate release. The Working Group is not in a position, however, to ascertain what happens in practice.

50. The authorities stated that only counsel (including consuls as of the fourth day of detention, in the case of foreigners) were authorized to visit pre-trial detainees. This was pursuant to the 1992 ordinance on prison regulations, which prohibited visits from any other persons, including relatives, in order to prevent outside contacts from interfering with the investigation by facilitating collusion of witnesses and the concealment or disappearance of evidence.

51. In accordance with these regulations, the authorities did not permit the Working Group to visit the Chi Hoa pre-trial detention centre in Ho-Chi-Minh City, on the grounds that it would not only be contrary to the provisions of the above-mentioned ordinance, but would set a precedent which could be invoked in other circumstances. They pointed out, however, that there were plans to amend the regulations and liberalize the visiting rules, particularly for the benefit of relatives, when outside contacts could no longer prejudice the investigation.

52. The Chi Hoa centre being on the list of places of detention to be visited, drawn up in coordination with the Vietnamese authorities prior to the visit, the Group proposed that it be authorized to visit that centre. The authorities referred to the applicable law, which prohibited persons under investigation from being visited, and stated that in this context they did not wish to create a precedent. The Working Group explained that its visit would not create a precedent and suggested ways and means whereby it would not be so considered. The Group's request not having been acceded to, it expressed its profound regret at the authorities' unyielding attitude, and hoped that such a visit would be permitted in the course of a subsequent mission, especially since this would provide evidence of the spirit of cooperation and give proof of the sincere efforts of the Vietnamese authorities to provide the transparency necessary to make such visits meaningful and productive.

2. Verifying the legality of pre-trial detention

53. Any improvement process must take account of the special characteristics of the institutional system in question. Among the most important of these special characteristics, the Working Group noted the special status and importance of the role of public prosecutors. Until 1960, the Public Prosecutor's Office was accountable to the Government. Since then, it has been accountable to the National Assembly, which, according to its President, indirectly confers on it a sort of popular legitimacy. It comprises three levels:

(i) The people's district prosecutors;

(ii) The people's provincial prosecutors;

(iii) The People's Supreme Prosecution Department.

54. The National Assembly elects one of its members as President of the People's Supreme Prosecution Department, who appoints the Vice-President and members of the provincial prosecutors' offices. The prosecutors' offices are now detached from, and thus independent of, the Ministry of Justice as regards the conduct of prosecutions, for which they have exclusive responsibility.

The Ministry of Justice is thus responsible only for preparing draft legislation and regulations, overseeing the judicial organization and functioning of provincial and district courts, training judicial staff and increasing public awareness of the law.

55. According to the persons with whom the Working Group spoke, this means that, as the courts are independent, it is quite natural for them to be responsible for verifying the legality of detention from the time of arrest until the trial proceedings, when the accused appears before a judge for the first time.

56. The Working Group, referring to article 9 of the International Covenant on Civil and Political Rights recently ratified by Viet Nam, wondered about the compatibility of the role of the public prosecutors with the principles governing the verification of the legality of detention laid down in paragraphs 3 and 4 of article 9:

> "3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power ...
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if his detention is not lawful."

57. The Working Group took the view that, however real the people's prosecutors' guarantees of independence, they were not yet such - despite the reform of 1960 - that they could be likened (equivalent guarantees theory) to those pertaining to the courts, for the following reasons:

(a) Firstly, the people's prosecutors' office admittedly stressed the independence of the Department of Public Prosecutions as regards the Government by pointing out that the head of the Supreme Prosecution Department was a member of parliament elected by the National Assembly; however, regardless of its merits, this interpretation can nevertheless be qualified. As the Constitution (art. 4 of which provides that: "the Communist Party of Viet Nam, as the advance guard of the working class, the faithful representative of the interests of the working class, of the working people and of the nation as a whole, and as an adherent of Marxism-Leninism and of the thoughts of Ho Chi Minh, is the driving force of the State and society. All the Party's organizations shall operate within the framework of the Constitution and law"), provides for a political system based on the one-party principle, the question of independence, although no longer relevant with regard to the Executive, is still relevant with regard to the party in power;

(b) Secondly, the lack of irremovability, which is one of the essential attributes of judicial independence, must be taken into consideration;

(c) Finally, the fact that the remedy available to an individual during pre-trial detention can be considered only by the people's prosecutor, means that it is closer to a discretionary hierarchical remedy than to a judicial remedy, within the meaning of article 14 of the International Covenant on

Civil and Political Rights, whereby "In the determination of any criminal charge against him, or of his right and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

3. Characterization of crimes against national security

58. For reasons possibly linked with recent history, the characterizations of offences as crimes against national security, as defined in article 73 of the Penal Code, draw no distinction on the grounds of the use or non-use of violence or of incitement or non-incitement to violence. The Working Group notes that the present wording of article 73 is so vague that it could result in penalties being imposed not only on persons using violence for political ends, but also on persons who have merely exercised their legitimate right to freedom of opinion or expression. However justified - or at least understandable - this assimilation of peaceful political action and violent action may be in a state of war, it nevertheless is becoming less and less compatible with the new policies laid down by the Government (see Recommendations, para. 76).

59. The process now under way is based on the gradual relaxation or lifting of restrictions on the exercise of certain basic rights recognized by the Vietnamese Constitution and referred to in articles 18 (freedom of thought, conscience and religion), 19 (freedom of opinion and expression), 21 (right of peaceful assembly) and 22 (freedom of association) of the International Covenant on Civil and Political Rights, which Viet Nam has ratified.

60. The Working Group recalls that, while articles 18 to 22 of the Covenant provide that such rights, however basic, may be subject to certain restrictions, nevertheless, such restrictions must not be such that they might, as at present, affect the enjoyment of the right itself (concept of permissible restrictions).

4. Legal cooperation

61. The Working Group noted that most, if not practically all, bilateral legal cooperation agreements, regardless of the countries concerned, particularly agreements on advisory services and technical assistance, are shaped by new economic policies, by amendments to business law (commercial code, company law, notarial law) or by the backgrounds of jurists in this field. Conversely, attempts to modernize criminal law, especially criminal procedure, to take account of recent political developments, are particularly few and far between. It would be desirable and advisable for other agreements to be concluded along these lines or for appropriate programmes to be set up, in a multilateral context, with the Centre for Human Rights.

5. The peaceful exercise of the right to freedom of opinion, expression and association

62. This is probably the area where the gap between the principles recognized by articles 69 and 70 of the new Constitution (freedom of speech, of the press, of information, of assembly, of association, of peaceful demonstration and of religion) and their actual exercise is widest. A case in point is the

recent law on the press, where the advances are partly offset by the continued need for prior authorization to publish. Similarly, the development of associative activities is in practice not closely enough linked with current relaxation policy.

IV. CONCLUSIONS

63. The Working Group noted with interest the new policies embodied in the new 1992 Constitution.

64. However, it was of the view that there was a widening gap between the rapid modernization of the economic system and the delay in acting on the new Constitution's guidelines on fundamental freedoms.

65. In this regard, the Working Group is concerned at the lack of progress in lifting de facto or de jure restrictions on freedom of opinion in all its forms, both individual and collective. The Commission will remember that, according to its methods of work, the Working Group is called upon to assess the relationship between detention and the peaceful exercise of the freedom of opinion, expression, assembly or association (cases of detention meeting the criteria of category II, see "Method of Work", E/CN.4/1992/20, annex I).

66. From another standpoint, the Working Group stresses, as the Human Rights Committee has already done (A/45/40, para. 492), the importance of developing associative activities; the Committee goes on to say that associations play a primordial role in informing the population of its rights.

67. Here, the Working Group is thinking not only of non-governmental human rights organizations, but also of those whose purpose might be to help users or consumers to become aware of their rights or to alert the public to the importance of protecting the environment.

68. Without such counterbalances, the booming market economy could work against the general interest.

69. With regard to the visit itself, the Working Group considers it essential, in discharging its mandate, to visit pretrial detention centres, since its main concern is the period of detention preceding trial. From experience, visits to re-education camps alone, where most prisoners were serving very long sentences, created a sort of time-lag since, in order to assess the legality of the detention, the delegation needed to look into the conditions and circumstances in which a given individual was arrested, or placed in custody or pre-trial detention many years earlier, sometimes more than 10 or 15 years.

70. Another observation: persons convicted of other than ordinary crimes appear to fall into two categories, one might almost say two "generations":

(a) Firstly, those serving very long sentences (one of the prisoners interviewed was in his seventeenth year of imprisonment) for offences linked with the aftermath of the fall of Saigon; as many of them had conducted secret armed-resistance operations on the instructions of their military commanders,

it would seem paradoxical for them to be still in prison while almost all of their leaders appear to have been released following the 1992 amnesty for senior army officers of the former regime.

(b) Secondly, the second "generation" which really consists of political opponents without any direct links to the previous period, who have been convicted, in some cases rightly and in others because of the ambiguity of article 73 of the Penal Code concerning offences against national security, without any distinction being drawn between the use or non-use of violence.

71. From this standpoint, article 73 of the Penal Code seems incompatible with articles 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights.

V. RECOMMENDATIONS

72/73. In the light of the foregoing observations, comments and conclusions, the Working Group makes the following recommendations:

A. Short-term

Transparency in the administration of prison establishments

74. Priority should be given to measures, already in effect in most countries, to introduce greater transparency into the administration of prison establishments. Most of such measures do not involve legislation and could therefore be taken rapidly.

75. A modernized prison administration must be able to provide, for example, a list of places of detention (like that contained in the annex to this report) and basic prison statistics, if only in the context of its participation in, and contributions to, international seminars and meetings on criminology and criminal sciences.

76. Again with a view to transparency, relatives should, as in most countries, be accorded visiting rights when such a measure is not, or is no longer, likely to affect the conduct of the investigation.

Amendment of article 73 of the Penal Code

77. With regard to the section of the Penal Code on offences against national security, and in particular article 73, the Working Group suggests that amendments be made to define clearly the conduct to be punished, so as to indicate what is prohibited without any ambiguity.

B. Medium-term

International conventions

78. Ratification of the optional protocols to the International Covenant on Civil and Political Rights.

Revision of the Code of Criminal Procedure

79. In revising the Code of Criminal Procedure, consideration could be given to the possibility of establishing a simplified emergency procedure (of the "application for amparo" or "habeas corpus" type) to be instituted before a judge or court and not just before the Public Prosecutor, so that the legality of all forms of deprivation of freedom, particularly pre-trial detention, can be ascertained in accordance with the provisions of article 14, paragraph 1, of the International Covenant on Civil and Political Rights, concerning the right of everyone to have his case heard by a competent, independent and impartial tribunal.

Freedom of opinion

80. Relaxation of the limitations and restrictions on the exercise of rights, particularly those recognized by articles 69 and 70 of the new Constitution concerning freedom of opinion (freedom of speech, of the press, of information, of assembly, of association, of peaceful demonstration, of belief and of religion).

C. Recommendations on follow-up to the visit

Advisory services

81. The Working Group recommends that the Centre for Human Rights should establish contact with the competent Vietnamese authorities to consider, in conjunction with the Working Group, the preparation and implementation of assistance programmes for the training of judges and law-enforcement officials. To this end, the members of the Working Group are at the disposal of the Centre to participate in the drafting and preparation of such programmes.

Follow-up to the visit

82. In order to be better able to fulfil the mandate entrusted to it by the Commission, the Working Group would be particularly receptive to the possibility of paying a second visit to Viet Nam so as to inform the Commission of developments since the drafting of this report and to visit pre-trial detention centres, in view of the importance attached by the Commission to this aspect of the Working Group's mandate.

83. Aside from the foregoing recommendations, the Working Group wishes to inform the Commission of the initiative which it took during its visit. In 1995, Viet Nam will celebrate the twentieth anniversary of its reunification. Aware of the symbolic significance of this event, the Working Group approached the Government, through the Minister of Justice, to propose that the occasion of the ceremonies to be held in commemoration of this event should be used to grant amnesty to persons still detained in camps for offences relating to the preceding period. The Working Group believes that a clemency measure of this kind would help to promote the national reconciliation sought by the Government.

Annex

LIST OF DETENTION CENTRES*

Labour re-education camps

1. AN DIEN (or DIEM)
2. HAM TAN - (Z-30.C)
3. HAM TAN - (Z-30.D)
4. PHAM DANG LUU (HCMC)
5. PHY YEN (A-10)
6. PHY YEN (Z-20)
7. PHY YEN (Z-30)
8. TIEN LANH
9. XUAN LOC (Z-30.A)
10. XUAN LOC (KB) or (K4)
11. XUAN PHUOC (A-20)
12. XUAN PHUOC (A-30)
13. XUYEN MOC

Prisons and other detention centres

14. BACH DANG (S-0-3) (HCMU)
15. BAN ME THUOT
16. BIEN HOA (B-5)
17. BINH DIEN (I)
18. CAY GIA (or GUA), CA MAU
19. CHI HOA (HCMV) (28-F)
20. CHUONG THIEN
21. CUNG SON
22. DAI BINH
23. LALAT
24. DONG TAP
25. DONG XUAN
26. GIA TRUNG
27. HAIPHONG
28. HA NOL
29. HO CHI MINH VILLE (B-34) (HCMV)
30. HO CHI MINH VILLE (T-82) (HCMV)
31. HOA LO (HANOI)
32. KHAM LON (or CA MAU CAN THO)
33. KHE SANH (C-13)
34. KIEN LANG
35. KINH 5 (CHUONG THIEN)
36. LAMPONG
37. LONG AN
38. LONG KHANH (K-4)
39. LONG KHANH (A-20)
40. LONG THANH
41. MY THO (TIEN GIANG)
42. NGHIA (or NGIA) KY
43. NHON H. LAP
44. PHAN DANG LUU (HCMV)
45. PLELBONG (T-15)
46. PLELKU (T-20)
47. QUANG NGAI
48. QUI/NHON
49. SON TINH
50. SUOI MAU (B-7)
51. THAN HOA
52. TON DUC (3-C) (HCMV)
53. TONG LE CHAN-SONG BE
54. TRUNG DOAN (12) (HCMV)
55. U MINH K GIANG
56. VUNG TAU

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* Unofficial. Compiled by the Working Group from data supplied by the Centre for Human Rights.